Supreme Court, U.S.
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No.

In the Supreme Court of the United States

TOWNSHIP OF LIBERTY, OHIO, et al.,
Petitioners,

v.

WEDGEWOOD LIMITED PARTNERSHIP I,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in direct conflict with decisions of this Court and other circuits discouraging the use of the federal court as a zoning board of appeals, the Sixth Circuit may create a federal law of zoning, which finds a deprivation of procedural due process in the refusal to grant a zoning application absent a state-created property right in the zoning application and absent any limitation on the discretion of the issuing authority?

2. Whether the Sixth Circuit can interpret the abstention doctrine in a manner to avoid reviewing the lower court's decision denying abstention solely to effectuate its federal law of zoning?

PARTIES TO THE PROCEEDINGS

Petitioners: The Petitioners are Township of Liberty, Ohio, located in Delaware County, Ohio, the Board of Trustees of Liberty Township, the individual Board members in their capacity as Trustees, and Holly C. Foust, Liberty Township Zoning Inspector. Petitioners were the defendants in the district court and the defendants-appellants in the court of appeals.

Respondent: The Respondent is Wedgewood Limited Partnership I. Respondent was the plaintiff in the district court and the plaintiff-appellee in the court of appeals.

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OPINIONS AND ORDERS ENTERED BELOW

Petitioners respectfully request a *writ of certiorari* issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this case. The Sixth Circuit, in conflict with this Court and other circuits, permitted a procedural due process claim premised on the denial of a zoning application in spite of the absence of a state-created property right entitled to constitutional protection.

Federal Court Opinions and Orders:

The Sixth Circuit Court of Appeals' Opinion was issued June 28, 2010, and is reported at 610 F.3d 340 (6th Cir. 2010) (Appendix A at 1a).

The Opinion and Order of the district court, per Judge Algenon L. Marbley, granting in part and denying in part the cross-motions for summary judgment of Petitioners and Respondent, was rendered on September 26, 2008, and is reported at 578 F. Supp. 2d 941 (S.D. Ohio 2008) (Appendix B at 38a).

The Opinion and Order of the district court, per Judge Algenon L. Marbley, granting in part and denying in part Petitioners' motion to dismiss, was rendered on October 12, 2006, and is reported at 456 F. Supp. 2d 904 (S.D. Ohio, 2006) (Appendix C at 64a).

An order denying rehearing *en banc* was issued August 29, 2010 (Appendix D at 135a).

STATEMENT OF THE BASIS FOR JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on June 28, 2010, and denied a timely-filed petition for rehearing *en banc* on August 29, 2010. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

This case involves the following constitutional provisions, statutes, and municipal ordinances, which are reproduced at Appendix E:

The Due Process Clause of the Fourteenth Amendment.

42 U.S.C. §1983.

Liberty Township Zoning Resolution §25.03 (2002).

STATEMENT OF THE CASE AND FACTS

This is a procedural due process case arising out of Petitioners' decision to deny zoning approval for Respondent's plan to develop a Wal-Mart Supercenter within Wedgewood Commerce Center ("WCC"), a Planned Unit Development ("PUD"), in Liberty Township approved by the Board of Trustees of Liberty Township in November of 1991. (Appendix B at 40a.) Seventeen subareas were created with three different types of designated use: commercial, residential, and office. Only subareas 3, 8, and 9 were zoned for commercial use. (Appendix B at 41a.) Respondent

owned an approximately 34-acre lot located in the WCC identified as subarea 3, which was allotted a maximum of 220,857 square feet of commercial building space. Over the next thirteen years, in accordance with standard Liberty Township zoning procedure, significant development occurred within the WCC. Parts of subareas not originally designated for commercial development were used for commercial development pursuant to permits for these zoning changes approved by Liberty Township. (Appendix C at 72a.)

Following the October 2003 denial of Respondent's application for variances, primarily from setbacks, to build a Wal-Mart Supercenter on subarea 3, the public expressed concern over the extent of commercial development, and Respondent formally withdrew the variance application. The Board of Trustees then ordered the Zoning Inspector to study the matter. (Appendix C at 72a-73a.) On January 19, 2004, the Zoning Inspector issued a Public Statement regarding the PUD Plan, (the "January 19 Instructions"), finding it imposed a "floating cap"or overall maximum of 500,000 square feet for commercial development within the WCC. (Appendix F at 139a.) On June 29, 2004, Respondent submitted an application for a zoning permit to build a 220,598 square foot Wal-Mart Supercenter and Murphy Oil Gas Station in subarea 3. (Appendix C at 75a-76a.) On September 30, 2004, the Zoning Inspector denied the application based both on its failure to comply with the overall commercial square footage maximum, as well as on its failure to comply with zoning requirements unrelated to the

January 19 Instructions.[1] (Appendices C at 76a; G at 147a.)

On October 20, 2004, Respondent initiated state court proceedings by appealing the Zoning Inspector's denial to the Liberty Township Board of Zoning Appeals ("BZA") for a number of reasons including its claim the January 19 Instructions were inaccurate. (Appendix C at 77a.) On November 5, 2004, in spite of its pending appeal to the BZA, Respondent filed this action in federal court. Respondent sought, among other relief, the following: 1) a declaration the enforcement of the overall limit or "floating cap" described in the January 19 Instructions violated Respondent's right to procedural due process; 2) an order enjoining Petitioners from enforcing the "floating cap"; and 3) an order requiring Petitioners to issue the sought after zoning certificate. (Appendix C at 79a, 82a-83a.)

Both Respondent's state and federal proceedings center on the issue of the overall limit on commercial development in the WCC to 500,000 square feet and whether it was part of the original PUD Plan approved in 1991 or was an amendment to the PUD Plan created by the January 19 Instructions. If the overall limit was part of the original PUD Plan, as Petitioners have urged in both proceedings, Respondent's zoning application was properly denied because the square footage sought for development of the Wal-Mart Supercenter would have caused the amount of

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[1] The district court agreed the zoning application was properly denied based upon these other failures unrelated to the January 19 Instructions. (Appendix C at 118a.)

commercial development to exceed this limit and no due process analysis was necessary. If the overall limit was an amendment to the PUD Plan, as Respondent has argued, a due process analysis was necessary to determine whether Petitioners followed state procedural requirements for zoning amendments and whether a failure to follow procedural requirements was a deprivation of due process.

State and federal proceedings reached the exact opposite conclusion on this issue. The BZA, the body designated by state law to make the factual determination in the state proceedings, determined the overall limitation was included in the original PUD Plan. Contrarily, the district court and the Sixth Circuit determined the January 19 Instructions amended the original PUD Plan to include the overall limitation. (Appendix A at 27a.)

The BZA upheld the Zoning Inspector's denial of the Zoning Application ("BZA1"). (Appendix C at 79a.) The state trial court, on appeal of BZA1, remanded the matter to the BZA to conduct evidentiary hearings. (Appendices C at 82a; H at 156a.) Between September 11, 2007 and June 24, 2008, the BZA conducted ten public evidentiary hearings pursuant to the remand order. (Appendix J at 189a-190a.)

The district court was aware of the remand to the BZA to hold evidentiary hearings, which had already begun. (Appendix B at 49a.) The hearings included testimony of those present at the time the PUD Plan was approved, including Respondent's principal. (Appendix J at 190a-191a.) Nonetheless, on October 12, 2006, the district court issued its Opinion and Order granting in part and denying in part the

motions to dismiss of Petitioners and Intervenor and rejecting Petitioners' request that the district court abstain in light of the pending state proceedings. (Appendix C at 64a.) Absent any evidentiary hearing, the district court interpreted the January 19 Instructions to be an amendment to the PUD Plan and proceeded with a due process analysis. (Appendix C at 126a-127a.) The district court dismissed Respondent's substantive and procedural due process claims after concluding, under Ohio law, Respondent had no vested property interest in the pre-January 19 Instructions zoning regulations as Respondent had no zoning application pending at the time the January 19 Instructions were issued. (Appendix C at 102a-103a.) Further, Respondent was not entitled to the applied for zoning certificate in light of the broad discretion of the issuing authority to approve or deny such applications under Liberty Township's Zoning Resolution §25.03. (Appendix C at 117a.) The district court allowed Respondent's claims for procedural due process based upon deprivation of a liberty interest and vagueness. (Appendix C at 128a and 130a.)

On September 25, 2008, following completion of the BZA evidentiary hearings and prior to the issuance of the BZA's findings and conclusions, the district court issued its Opinion and Order on the parties cross-motions for summary judgment. (Appendix B at 38a.) The district court reiterated its previous conclusion the January 19 Instructions amended the PUD Plan in which it concluded Respondent had a liberty interest. (Appendix B at 55a and 57a.) The district court then relied on *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), to find Respondent had been constitutionally entitled to notice and hearing prior to the amendment and the failure to

provide these procedures deprived Respondent of its right to procedural due process. (Appendix B at 57a.) The district court also granted Respondent summary judgment finding the PUD Plan unconstitutionally vague as applied. (Appendix B at 60a.) The district court, therefore, enjoined enforcement of the January 19 Instructions and application of the "floating cap." However, the district court denied Respondent's request for declaratory judgment, refusing to order Petitioners to issue Respondent the zoning permit. The district court cited its prior holding finding the Zoning Inspector's denial of the permit was not unwarranted based upon Respondent's failure to comply with elements of Petitioners' zoning regulations in effect prior to the January 19 Instructions. (Appendix B at 62a.)

Less than one month after the district court's summary judgment decision, the BZA issued its Findings of Fact and Conclusions of Law ("BZA2") affirming the denial of Respondent's zoning application. (Appendix J at 181a.) The BZA concluded the PUD Plan had from the outset included an overall 500,000 square foot maximum for commercial development within the WCC. (Appendix J at 202a-203a.) The BZA further concluded the January 19 Instructions were not pertinent to Respondent's zoning application and that Respondent's zoning application was justifiably denied for nine reasons unrelated to that 500,000 square foot overall limitation or "floating cap". (Appendix J at 210a.)

Respondent pursued an administrative appeal of BZA2 to the state trial court. The state trial court found the appeal moot and dismissed for lack of subject matter jurisdiction. (Appendix K at 215a.) The

state appellate court affirmed the dismissal. (Appendix L at 225a.) The Supreme Court of Ohio denied jurisdiction to consider the matter. (Appendix M at 238a.)

On June 28, 2010, in a split decision, the Sixth Circuit panel affirmed the district court's grant of a permanent injunction holding Petitioners deprived Respondent of its procedural due process rights. However, in contrast to the district court and the dissent, the majority found a deprivation of Respondent's protected property interest on which to base its holding. The majority rejected the district court's basis for finding a violation of procedural due process, which was the deprivation of a liberty interest. (Appendix A at 21a.) The majority did so in spite of its recognition of the absence of any state-created vested property interest in the zoning application or in the pre-January 19 Instructions zoning regulations based solely on Respondent's failure to follow state procedures for zoning amendments and in spite of the absence of an entitlement to the zoning application. (Appendix A at 22a-23a.) In so doing, the Sixth Circuit approved the federal law of zoning crafted in its prior decision in *Nasierowski*, *supra*.

Subsequent to the Sixth Circuit's Opinion, the case was returned to the district court for trial on the remaining issue of damages. Trial is scheduled to begin on November 29, 2010.

REASONS FOR ALLOWANCE OF THE WRIT

The Sixth Circuit has crafted a federal law of zoning, which encourages disappointed landowners to bring their local land use disputes to the federal court acting as a federal zoning board of appeals, under which landowners will obtain results more favorable than those they could have obtained in state court. This new rule contradicts this Court's requirements for establishing procedural due process claims by allowing state procedures to be substituted for a vested property interest and by eliminating the requirement of an entitlement based on limits of the discretion of the issuing authority to decide upon the land use application. This federal law of zoning also conflicts with the law of other Circuits, which eschew the role of zoning board of appeals and seek to limit the involvement of the federal courts in local land use disputes.

I. The Sixth Circuit Court of Appeals Has Created a Federal Law of Zoning Applicable to Procedural Due Process Challenges to Local Land Use Decisions, Which Conflicts with the Law of the State, this Court's Precedent, and the Decisions of Other Circuits.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. The Due Process Clause has been interpreted to guarantee both procedural and substantive due process. To obtain relief on a procedural due process claim, the plaintiff must establish the existence of (1) a liberty or property

interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process. *Shanks v. Dressel*, 540 F.3d 1082, 1090 (9th Cir. 2008). "To prevail on either a procedural or substantive due process claim under 42 U.S.C. §1983, 'a plaintiff must first establish that a defendant's actions deprived plaintiff of a protectible property interest.'" *Nichols v. Bd. of County Comm'rs of the County of La Plata, Colorado*, 506 F.3d 962, 969 (10th Cir. 2007).

This Court has clarified that courts must address whether the plaintiff has a protected property interest before addressing whether the government's "procedures comport with due process." *American Mfrs. Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 59, 119 S. Ct. 977, 989, 143 L. Ed. 2d 130 (1999). "The possession of a protected life, liberty, or property interest is a condition precedent to invoking the government's obligation to provide due process of law." *Stauch v. City of Columbia Heights*, 212 F.3d 425, 429 (8th Cir. 2000).

The Court has established an entitlement test for lower courts to apply to determine whether a protected property interest exists so as to allow a plaintiff to proceed with its procedural due process claim. This entitlement test originated with this Court's decisions in *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), and *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). In *Perry*, the Court adopted the entitlement requirement. "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement

to the benefit and that he may invoke at a hearing." 408 U.S. at 601, 92 S. Ct. at 2699. In *Roth*, the Court added that these rules come not from federal law, but "stem from an independent source such as state law." Further, a unilateral "expectation" is not a property interest. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577, 92 S. Ct. at 2709. Finding a protected property interest, therefore, requires a two-step analysis: 1) is there a state-created and defined property interest and, if so, 2) is it constitutionally protected.

A. The Sixth Circuit's Federal Law of Zoning Contradicts Ohio's Law Regarding the Creation of a Vested Property Right.

In *Roth*, the Court specifically held: "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577, 92 S. Ct. at 2709. "State supreme court decisions are controlling authority for such determinations." *Hamilton v. Myers*, 281 F.3d 520 (6th Cir. 2002). The failure of Respondent to establish the first step, a property interest created and defined under Ohio law, should have ended the due process analysis and prevented any finding of a deprivation or an injunction resulting therefrom.

The law in Ohio is clear as set forth by the highest court in Ohio and cited by the dissent below: "In Ohio, a property owner's right to an existing zoning classification vests 'upon the filing of the application for the [building or zoning] permit.'" (Appendix A at 31a, citing *Gibson v. City of Oberlin*, 167 N.E.2d 651, 654 (Ohio 1960), and *Zaremba Dev. Co. v. City of Fairview Park*, 616 N.E.2d 569, 571 (Ohio Ct. App. 1992).) "It must be pointed out that it is the time of the application for the permit which is crucial in determining whether a zoning change is retroactive." (Emphasis added.) *Laderman & Weiss Realty Co. v. City of Beachwood*, 271 N.E.2d 844, 846 (Ohio 1971). Further, in addition to filing, the permit application must comply with all legislative requirements to create a vested property interest. *Zaremba*, 616 N.E.2d at 571, *citing Gibson*.

The majority below acknowledged it "must look to substantive state zoning laws" (emphasis added) to determine whether Respondent established a vested property interest and specifically found: "It is uncontested that Wedgewood submitted its application for a zoning certificate on June 29, 2004, after the Trustees adopted the Instructions." (Appendix A at 22a.) Under Ohio law, even if the January 19 Instructions amended the existing zoning regulations, Respondent had no vested property right in those zoning regulations or in having its permit approved as there was no application pending at the time the January 19 Instructions were issued. Additionally, Respondent had no vested right based upon the failure

of the zoning application ultimately filed to meet all other legislative requirements.[2]

Nonetheless, the majority ignored the absence of a vested property right, choosing to make the "salient issue" in this threshold determination not whether a property interest had been created and defined under the law of the State of Ohio, but "whether the Zoning Commission had the authority under Ohio law to take the action that it did," issuing the January 19 Instructions without notice and hearing as required of amendments under Ohio Revised Code §519.12. (Appendix A at 23a.) In other words, the "salient issue" according to the Sixth Circuit was whether Petitioners had complied with the procedures attendant to the substantive property right, not whether the substantive property right existed.

Federal law is clear, however, that state procedures fashioned to protect substantive rights are not themselves substantive rights. "Due process is not an end in itself. Rather, the constitutional purpose of Due Process 'is to protect a substantive interest to which ... [a party] has a legitimate claim of entitlement.'" *Hyde Park Company*, 226 F.3d at 1210. "Absent a substantive property interest in the outcome of procedure, [plaintiff] is not constitutionally entitled to

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[2] The district court also found "the Zoning Inspector based her denial on a number of reasons, many of which were unrelated to the January 19 Instructions." "In addition to the Zoning Inspector's finding the requested certificate of appropriateness did not comply with the floating cap set forth in the January 19 Instructions, the Zoning Inspector based her denial of Plaintiff's permit application on" nine reasons unrelated to the January 19 Instructions. (Appendix C at 118a.)

insist on compliance with the procedure itself. 'To hold otherwise would immediately incorporate virtually every regulation into the Constitution.'" *Shanks v. Dressel*, 540 F.3d 1082, 1092 (9th Cir. 2008).

Further, procedures can not be considered limits on discretion sufficient to turn these procedures into substantive rights. As the dissent noted, "'state procedural requirements cannot be the types of 'limits on discretion' that are sufficient to find a property interest. In order for limits on discretion to create property interests, they must be *substantive* limits on discretion.'" (Appendix A at 36a, *citing Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520 (6th Cir. 2007). "The fact that the state gives the licensee certain procedural rights in determining the substantive right (e.g., an oral hearing, appointed counsel, or two administrative appeals) does not turn those procedural rights into federal due process rights. Nor could it, without simply rendering state procedural law enforceable in federal court." (Appendix A at 33a, *citing Experimental Holdings*, 503 F.3d at 520.

This Court has repeatedly rejected the notion that procedures alone can create a substantive right entitled to procedural due process protection.

> Thus, in every instance of property recognized by this Court as calling for federal procedural protection, the property has been distinguishable from the procedural obligations imposed on state officials to protect it .... [T]he property interest recognized in our cases has always existed apart from state procedural protection before the Court has recognized a

> constitutional claim to protection by federal process. To accede to Gonzales's argument would therefore work a sea change in the scope of federal due process, for she seeks federal process as a substitute simply for state process.... Gonzales's claim would thus take us beyond *Roth* or any other recognized theory of Fourteenth Amendment due process, by collapsing the distinction between property protected and the process that protects it, and would federalize every mandatory state-law direction to executive officers whose performance on the job can be vitally significant to individuals affected.

Town of Castle Rock v. Gonzales, 545 U.S.748, 772, 125 S. Ct. 2796, 2812-13, 162 L. Ed. 2d 658 (2005) (Concurrence)(citations to five U.S. Supreme Court decisions omitted).

In discussing due process claims in zoning cases, the Seventh Circuit has gone so far as to state that "the Constitution does not require state and local governments to adhere to their procedural promises. Failure to implement state law violates that state law, not the Constitution; the remedy lies in state court." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166-67 (7th Cir. 1994). The Sixth Circuit's federal law of zoning ignores the first step of the analysis required by this Court to establish a protected property interest, a state-created and defined property interest, and conflicts with the law of the State of Ohio, which requires the filing of a zoning application that satisfies all other legislative requirements to vest the landowner with a property right in the permit under the existing zoning.

B. The Sixth Circuit's Federal Law of Zoning Contradicts this Court's Entitlement Rule Applicable to Procedural Due Process Claims.

The Sixth Circuit's federal law of zoning also ignores the second step of the procedural due process analysis, establishment of an entitlement based upon limits on the discretion of the state official to deny the sought after land use. In *Gonzales*, 545 U.S. at 756, 125 S. Ct. at 2803, 162 L. Ed. 658, the Court established discretion as the test to determine whether a benefit is an entitlement. "Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Id.*

"In municipal land regulation cases such as this, the entitlement analysis presents a question of law and focuses on 'whether there is discretion in the defendants to deny a zoning or other application filed by the plaintiffs.'" *Hyde Park Company v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000), *citing Norton v. Village of Corrales*, 103 F.3d 928, 931-32 (10th Cir. 1996). "'The entitlement analysis centers on the degree of discretion given the decisionmaker and not on the probability of the decision's favorable outcome.'" *Hyde Park*, 226 F.3d at 1211, *citing Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1116 (10th Cir. 1991).

"In determining whether statutes and regulations limit official discretion, the Supreme Court has explained that we are to look for "'explicitly mandatory language,'" *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must

follow.'" *Ridgely v. Federal Emergency Mgmt. Agency*, 512 F.3d 727, 735-736 (5th Cir. 2008), *citing Ky. Dept. of Corrections v. Thompson*, 490 U.S. 454, 463, 109 S. Ct. 1904 (1989). "Without clearly defined limitations on the City Council's exercise of discretion to assist us in our construction of local law, we hesitate to infer such limits and involve this federal court in a land use regulation dispute which, is purely a matter of local concern." *Hyde Park Company*, 226 F.3d at 1212 (10th Cir. 2000). The district court, in the only decision below to discuss discretion, concluded Liberty Township's Zoning Commission retained "broad discretion."

After concluding the January 19 Instructions effected an amendment to the applicable zoning, the district court proceeded to perform a due process analysis. Although considered under its discussion of Respondent's substantive due process claim, the district court properly applied the entitlement test to Respondent's assertion of "a protected property right in the applied for zoning certificate, as well as the PUD Plan and the corresponding WCC Development Standards." The district court found: "The Liberty Township Zoning Resolution grants the Commission *broad discretion* to determine whether to grant or deny applications for zoning permits. See Liberty Township Zoning Resolution §25.03 (2002). Nothing in the Zoning Resolution states that an applicant is automatically entitled to a requested zoning permit." (emphasis added.) (Appendix C at 116a-117a.) In its subsequent discussion of Respondent's procedural due process claim based on a property interest, the district court repeated its finding Respondent did "*not* have a

bona fide property interest in the zoning permit it seeks." (Emphasis added.)[3] (Appendix C at 122a.)

Left without a protected property interest on which to base a procedural due process claim, the Sixth Circuit's procedural due process analysis should have been at an end. However, instead of affirming the district court's grant of summary judgment to Petitioners on Respondent's procedural due process claim based upon the absence of a protected property interest, the Sixth Circuit proceeded to effectuate the federal law of zoning it had created in its decision in *Nasierowski*, 949 F.2d 890, which requires neither a state-created property interest nor a determination of entitlement based on limits to the discretion of the decisionmaker.

In *Nasierowski*, the plaintiff purchased an undeveloped parcel of real estate based upon the City's representation the proposed development was permitted under the relevant zoning regulations, which classified the property as "general business district". 949 F.2d at 891. Subsequent to the purchase, the City Council adopted a zoning ordinance, which rezoned the property to permit only office development. The plaintiff filed an action in federal court alleging, *inter alia*, a procedural due process claim. The district court concluded the plaintiff had no protected property interest in the prior zoning classification under Michigan law, which provided no

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[3] Unable to establish a protected property interest, the district court concluded, without legal support, that Respondent had a liberty interest in the January 19 Instructions. This conclusion was abandoned by both the Sixth Circuit and Respondent on appeal. (Appendix A at 21a.)

such property interest could have vested until the landowner "had secured a building permit and actually commenced construction on the site." *Id.* at 893.

The Sixth Circuit panel reviewed Michigan law as set forth in *City of Lansing v. Dawley*, 225 N.W. 500 (Michigan 1929), in which the Michigan Supreme Court found the property owner had no vested right in the prior zoning ordinance under which he had been issued a building permit as the work done to the property was insufficient to vest the landowner with a property right in the prior zoning ordinance. The Sixth Circuit then ignored *City of Lansing's* requirement of a building permit and concluded the state court found no vested property right solely because the landowner had not "done *anything of a substantial character* towards the construction of the building." *Nasierowski*, 949 at 897. The Sixth Circuit went on to find the "acquisition of the land was, in and of itself, a *substantial* act" and, in addition to the expenditure of "considerable money and effort," vested the plaintiff with "a property interest in the old zoning classification within which his development was permitted." *Id.* At no point did the Sixth Circuit undertake the second step in the procedural due process analysis. It did not consider whether limits on the discretion of the decisionmaker existed to approve or deny the building permit so as to create an entitlement to its approval.

Binding Sixth Circuit precedent existed at the time, which held the "viability of plaintiff's due process claim depends upon establishing that the local board did not have discretion to deny the proposed lot-split once the plaintiff complied with the mandatory minimal requirements. If, as held by the district court,

the board members had discretion as to whether or not to approve the proposal, then plaintiff had neither a 'legitimate claim of entitlement,' nor a 'justifiable expectation,' in approval of the proposed lot-split. On the other hand, if state law circumscribed the discretion of the board members to the point that approval was mandatory once plaintiff met the minimal requirements of the applicable regulations, then the board members acted illegally." *G.M. Engineers and Associates, Inc. v. West Bloomfield Twp.*, 922 F.2d 328, 331 (6th Cir. 1990).

The *Nasierowski* panel ignored that precedent and its requirement of an entitlement based on limits to the decisionmakers' discretion, as well as Michigan's requirement of a building permit, to find a protected property interest. Thus, the federal law of zoning was created. The City neither sought rehearing *en banc* so as to allow the Sixth Circuit to reconcile the panel decision with prior binding precedent nor filed a petition with this Court seeking issuance of a *writ of certiorari*.

The Sixth Circuit relied on *Nasierowski* to decide *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001), *rev'd in part, vacated in part*, 538 U.S. 188, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003), in which it considered the landowners' claim that a citizens' referendum opposing an ordinance approving the landowners' site plan violated the landowners' procedural due process. Although the district court had granted summary judgment to the City for other reasons, it doubted the landowners could have established a protected property interest under the entitlement analysis based upon the discretion of the City. "The Court is not convinced that the

Developers have established that they had a *due process entitlement* to the building permit simply because Council approved their site plan. Council's approval of the plan was not only discretionary, but *conditional*. It depended on the fulfillment of numerous conditions, one of which was the building of a fence. Although the Developers have successfully argued (for ripeness purposes) that it would have been fruitless to build a fence under the circumstances, the fact is the fence was never built. Without satisfying all conditions, the Developers are hard-pressed to argue that they were constitutionally entitled to a building permit." *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 209 F. Supp. 2d 719, 725 (N.D. Ohio 1996).

The Sixth Circuit relied on *Nasierowski* to ignore the district court's concerns and found "plaintiff's property interest was securely vested upon the City's affirmative representation that the site plan conformed with the existing zoning regulations as reflected by the City's approval, by ordinance, of the site plan." *City of Cuyahoga Falls*, 263 F.3d at 643. The City filed a petition seeking a *writ of certiorari* asking this Court to consider, *inter alia*, whether "the due process clause of the constitution require[s] a municipal corporation to issue building permits when the underlying conditions for the issuance of building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?" Petition for Writ of Certiorari-Questions Presented for Review at 3, *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 536 U.S. 938 (2002) (No. 01-1269), 2002 WL 32135019. In its petition, the City noted "the approval of the site plan was but one of

many prerequisites to the issuance of building permits. All lawful requirements had to be fulfilled before Buckeye could claim a 'legitimate expectation' to permits." *Id.* at *6. The Court granted the petition to consider this question. However, because the Court found the refusal to issue a building permit while the referendum was pending was not egregious or arbitrary, the Court did not decide the issue of "whether respondents possessed a property interest in the building permits." *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188,198, 123 S. Ct. 1389, 1396, 155 L. Ed. 2d 349 (2003). The Court thus left *Nasierowski* alive and well in the Sixth Circuit.

Following *Nasierowski*, even when lower courts follow the entitlement rule, they are forced to address landowners' citations to *Nasierowski*. See *Seguin v. City of Sterling Heights*, 968 F.2d 584, 591 (6th Cir. 1992)(in spite of the absence of a building permit and Michigan's strict rule requiring both a building permit and some substantial construction before property rights can vest, the landowners argued they had a protected property interest in the prior zoning classification); and *EJS Properties, LLC v. City of Toledo*, 2010 WL 3488702 (N.D. Ohio, W.D. Sept. 2, 2010)(Judge Games G. Carr, dissenting Judge in the Sixth Circuit's opinion below, felt obliged to address *Nasierowski* and *Wedgewood* when considering a procedural due process claim in a land use case even after concluding the landowners had failed to establish a protected property interest).

In *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202-203 (6th Cir. 1995), *cert. denied*, 516 U.S. 816, 116 S. Ct. 70, 133 L. Ed. 2d 31 (1995), the Sixth

Circuit found the landowner had no protected property interest in a special use permit based upon the discretion of the City Council to grant or deny the permit. The landowner advanced the holding in *Nasierowski* to support its claim of a property interest based upon implied contract. *Id.* at 203. The appellate court was forced to distinguish *Nasierowski* on the fact the landowner therein was challenging rezoning instead of seeking a special use permit although the difference in land uses sought should not affect the application of the entitlement rule. The landowner continued to assert *Nasierowski* in a petition filed with this Court seeking *certiorari* for the Court to decide "Whether, despite a discretionary zoning ordinance, a property or liberty interest may arise from contract or implied contract principles?" Petition for Writ of Certiorari, *Triomphe Investors v. City of Northwood*, 516 U.S. 816 (1995) (No. 94-1991), 1995 WL 17047896. The Court denied the landowner's petition. *Triomphe Investors v. City of Northwood*, 516 U.S. 816, 116 S. Ct. 70 (1995).

As set forth in the above-cited cases, litigants and lower courts in the Sixth Circuit are now free to choose whether to follow the federal law of zoning set forth in *Nasierowski* and the Sixth Circuit's opinion below or to follow this Court's entitlement test depending upon the outcome desired. Petitioners seek a *writ of certiorari* to the Sixth Circuit so that this Court may reject the Sixth Circuit's novel federal law of zoning and eliminate the necessity of further judicial resources being devoted to addressing it.

C. The Sixth Circuit's Federal Law of Zoning Leaves the Sixth Circuit Standing Alone Among the Circuits In Eliminating the Requirement of Entitlement to Establish a Procedural Due Process Claim in a Land Use Case.

The Sixth Circuit's federal law of zoning puts it in direct conflict with the other circuits, which follow this Court's entitlement rule and its reliance on limits on discretion in considering procedural due process claims arising out of denials of local land uses. "Despite the lack of Supreme Court guidance, lower federal courts always apply the entitlement rule in procedural due process cases." Mandelker, "Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation," 3 Wash. U. J. L. & Pol'y 61, 65 (2000). See *West Street Group LLC v. Epro*, 564 F. Supp. 2d 84 (D. Mass. 2008), *citing Macone v. Town of Wakefield*, 277 F.3d 1, 9 (1st Cir. 2002) (Discretionary nature of the Zoning Board of Appeals' approval of low income development, as well as in rescinding its approval, prevented approval from being considered an entitlement.); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378-79 (2nd Cir. 1995) (A protected property interest "exists only when 'the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.'"); *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 679 (3rd Cir. 1991) ("We have held that an entitlement may exist for a benefit sought but not yet obtained if state law limits the exercise of discretion by the state official responsible for conferring the benefit."); *Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 826 (4th Cir. 1995)(The discretion of the County Board of Commissioners, which barred a claim of entitlement to

approval of an application for a special zoning designation, was evident in the use of the word "may" in the zoning ordinance. Criteria imposed for qualification for the designation were preconditions and not entitlements as "the question of whether criteria are met must be resolved by the exercise of judgment."); *Ridgely*, 512 F.3d at 736 (Eligibility criteria absent "explicitly mandatory language" that the benefit must be awarded if the criteria are satisfied does not establish an entitlement."); *Snaza v. City of Saint Paul, Mn.*, 548 F.3d 1178, 1183 (8th Cir. 2008) ("A permit applicant may have a legitimate claim to entitlement if the government's discretion is constrained by a regulation or ordinance requiring issuance of a permit when prescribed terms and conditions have been met." Further, "[a]pproval of a conditional use permit in Minnesota generally follows as a matter of right only if the permit application meets local requirements for issuance." Ohio law is similar in that a property right vests only if the application meets all other legislative requirements, which the district court found Respondent's application did not."); *Shanks*, 540 F.3d at 1090 (9th Cir. 2008) (Entitlement requires "mandatory language that significantly constrains the decisionmaker's discretion."); *Nichols*, 506 F.3d at 970-71 (10th Cir. 2007) (A property interest exists if discretion is limited by procedures, which, if followed, require a particular outcome, but not if discretion remains. A requirement that the zoning board consider six enumerated factors did not confer entitlement simply because the factors were met."); *Circa Ltd. v. City of Miami*, 79 F.3d 1057, 1061-62 (11th Cir. 1996) (A developer had no protected property interest in a redevelopment plan where the City Charter imposed some limitations on solicitation and review of proposals, but the City Commission with

ultimate authority for selecting proposals was required only to "consider what is 'most advantageous to the city'" making its decision "fully discretionary."); and *3883 Connecticut LLC v. District of Columbia*, 336 F.3d 1068, 1072 (D.C. Cir. 2003) (Official's discretion is to be considered in determining the property interest of an applicant in receiving a permit, as well as in determining the property interest of a permit holder in retaining a permit).

Although the Circuits may divide on the issue of the extent to which discretion must be limited to create an entitlement, discretion remains the determining factor. This divide does not come into play in this case as the district court identified no limits, specifically noting the "broad discretion" of the Zoning Commission, and the Sixth Circuit ignored the issue of discretion in its entirety. The Sixth Circuit is alone in so boldly departing from this Court's entitlement rule.

However, this may not remain the case. Unfortunately, the Sixth Circuit's federal law of zoning has been adopted by lower courts in other circuits creating the possibility of intra-circuit conflicts in those circuits and further division among the circuits. In *Moreland Properties, LLC v. City of Thornton*, 559 F. Supp. 2d 1133, 1148 (D. Colo. 2008), the court followed *Nasierowski's* holding that a "new owner's purchasing of land because of its zoning classification" itself is the "substantial act" sufficient to entitle the landowner to the existing zoning classification in spite of its own reading of Colorado law requiring "the landowner's substantial actions." Additionally, the Sixth Circuit's decision has already been cited in land use practice guides for the federal law created therein, which finds a protected property interest in the zoning

procedures themselves. "Although the developer did not submit a compliant application until after the change was announced, it had a property interest–a 'justifiable expectation'–that the zoning classification would remain the same until amended in compliance with statutory and ordinance procedures for amendment." *Constitutional Law–Due Process*, 62 Plan. & Envtl. L. 366 (October 2010).

Petitioners seek a *writ of certiorari* to the Sixth Circuit to reject the Sixth Circuit's federal law of zoning, to eliminate the inter-circuit conflict created by this law, and to prevent its adoption in other circuits.

D. The Sixth Circuit's Federal Law of Zoning Elevates the Role of the Federal Courts in Local Land Use Disputes In Direct Contradiction to the Attempts of Other Circuits to Extricate the Federal Courts From Such Matters of Local Concern.

The Sixth Circuit's federal law of zoning vitiates this Court's holding that the federal courts should not be in the business of adjudicating local land use decisions. "State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *San Remo Hotel, L.P. v. City and Cty. of San Francisco, Ca.*, 545 U.S. 323, 347, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005). Other circuits agree the federal courts should not be "cast in the role of a 'zoning board of appeals.'" *United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa.*, 316 F.3d 392, 402 (3rd Cir. 2003).

In *United Artists*, Justice Alito, serving as a Judge of the Third Circuit, believing land use decisions to be "matters of local concern," limited the number of substantive due process claims arising out of land use decisions decided by federal courts in the Third Circuit by applying the "shocks the conscience" standard in lieu of the less stringent "improper motive" test. 316 F.3d at 402. The Seventh Circuit has gone even further. In *River Park, Inc.*, 23 F.3d at 165, the court began its opinion addressing the failure of the City to grant a zoning application by stating: "Federal courts are not boards of zoning appeals. The message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges." The Seventh Circuit, even assuming that state law required the City to grant the application, refused to find a procedural due process deprivation as the refusal to follow that law "violates that state law, not the Constitution; the remedy lies in state court." *Id.* at 166-67. The First Circuit similarly found constitutional claims based on rescission of the endorsement of a developer's low-income housing project to have raised a "matter of local concern" and to have been fully reviewable under state law. *Macone*, 277 F.3d at 10-11 (1st Cir. 2002). The court cited its prior holdings to state:

> Every appeal by a disappointed developer from an adverse ruling by a local Massachusetts planning board necessarily involves some claim that the board exceeded, abused, or 'distorted' its legal authority in some manner, ... It is not enough simply to give these state law claims constitutional labels such as 'due process' or

'equal protection' in order to raise a substantial federal question under section 1983.

The Sixth Circuit has cast the federal court in exactly the role other circuits have gone to great lengths to avoid, that of a zoning board of appeals. With the elimination of the threshold determination of a protected property interest created and defined by state law, the Sixth Circuit has established itself as a board of appeals employing a law of zoning that is eminently more amenable to landowners than state law, which would require a state-created and defined property interest and limits on discretion of the decisionmaker.

II. The Sixth Circuit's Refusal to Review the District Court's Decision on Abstention Was Improper, But Necessary to Effectuate Its Federal Law of Zoning.

The initial factual determination as to whether the January 19 Instructions' overall limitation of 500,000 square feet of commercial development was a restatement of or an amendment to existing zoning was resolved differently by the state and federal courts. The BZA, the body to make the factual determination in the state proceedings, determined the overall limitation was included in the original PUD Plan. Respondents attempted to appeal that decision to the Ohio Supreme Court, but ultimately lost. The district court and the Sixth Circuit came to the opposite conclusion.

Whereas the BZA's factual determination would have resolved Respondent's procedural due process claim, the federal courts' interpretations allowed it to

proceed and left the parties with conflicting findings of fact. The federal court could have avoided this conflict by abstaining, as requested by Petitioners, as the federal court was fully aware of the pending state proceedings at the time of its decision, particularly that the state court had remanded the appeal back to the BZA for evidentiary hearings.

In its Opinion and Order on Petitioners' motions to dismiss, the district court, however, denied abstention solely to avoid further delay. (Appendix C at 111a-112a.) Although abstention was fully-briefed by both parties on appeal, the Sixth Circuit refused to address the district court's abstention decision as beyond the scope of its jurisdiction. (Appendix A at 11a-13a.)

The Sixth Circuit relied on its prior decision in *Summers v. Leis*, 368 F.3d 881, 889 (6th Cir. 2004), to find the district court's abstention ruling was not "inextricably linked" with its order granting injunctive relief. However, the Sixth Circuit ignored the portion of its decision in *Summers*, which would have allowed it to review the district court's abstention decision. In *Summers*, 368 F.3d at 890, the Sixth Circuit found abstention was not "critical because, even if the district court is required to abstain under *Younger* and dismiss the suit, such a result has no effect on whether Leis is entitled to qualified immunity. Nothing pertaining to the qualified immunity issue could potentially interfere with ongoing state proceedings, thus review of the court's *Younger* abstention decision is not 'necessary to ensure meaningful review of' the denial of qualified immunity.'"

If the district court had abstained in this case, the parties would have been left with the BZA's conclusion

in the state proceedings that the 500,000 square foot overall limit was part of the PUD Plan as opposed to an amendment thereto and the resulting conclusion that the zoning application was properly denied for the reason it exceeded the overall limit.[4] Such a finding would have obviated any need for a procedural due process analysis and eliminated the possibility of a finding of a deprivation of Respondent's right to procedural due process. The district court's refusal to abstain resulted in the district court finding, contrary to the state court, that the overall limitation of commercial space in the January 19 Instructions amended the PUD Plan. That allowed the district court to proceed with a due process analysis, and to find a deprivation of procedural due process resulting in a permanent injunction, which was considered by the Sixth Circuit on appeal.

In *Summers*, regardless of whether the federal court abstained, Leis would have been entitled to qualified immunity. In the case at bar, had the federal court abstained, Respondent would not have been entitled to a permanent injunction. The issue of abstention was clearly "inextricably intertwined" with the appealable decision on the permanent injunction.

Further, the decision on abstention interfered with the state court proceedings as the matter remains before the federal court on the issue of damages for a procedural due process deprivation in spite of the state

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[4] Both the BZA and the district court agreed the zoning application would have been denied regardless of the January 19 Instructions based upon failures to meet zoning requirements unrelated to the overall limit.

court's finding of no such deprivation. The holding in *Summers* called for the Sixth Circuit to consider the district court's ruling on abstention; however, to do so might have deprived the Sixth Circuit of the opportunity to effectuate its federal law of zoning.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a *writ of certiorari*.

Respectfully submitted,

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